

HOWARD ELLIS,)	3:08-cv-00657-MMD-WGC
)	
Plaintiff,)	<u>ORDER</u>
)	
vs.)	
)	
JAMES BENEDETTI, et. al.)	
)	
Defendants.)	
)	

Plaintiff, a pro se litigant and inmate in custody of the Nevada Department of Corrections (NDOC) filed this action pursuant to 42 U.S.C. § 1983. (Doc. # 1.) The court screened the original complaint and dismissed the action with prejudice for failure to state a claim pursuant to 28 U.S.C. § 1915(e)(2). (Doc. # 4.) Plaintiff appealed and the Ninth Circuit affirmed in part, reversed in part, and remanded with instructions for the district court to consider whether leave to amend is appropriate. (Doc. # 18.) The action was then reopened and Plaintiff was given an opportunity to file an amended complaint. (Doc. # 23.) Plaintiff filed an amended complaint,

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1 which the court screened. (Docs. # 37, # 38.) The court allowed Plaintiff to proceed with certain
2 colorable claims: (1) Count 1- procedural due process related to a disciplinary charge; (2) Count
3 2- Eighth Amendment excessive force and Eighth Amendment deliberate indifference to a
4 serious medical need; (3) Count 3- First Amendment access to courts; (4) Count 4- Fourteenth
5 Amendment procedural due process and conspiracy; (5) Count 6- First Amendment retaliation;
6 (6) Count 7 – Eighth Amendment excessive force and deliberate indifference and First
7 Amendment retaliation; and (7) Count 8- First Amendment retaliation and conspiracy. (Doc. #
8 37.)
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11 Defendants then filed a motion to dismiss. (Doc. # 101.) The court issued a report and
12 recommendation that the motion be granted in part and denied in part (Doc. # 186), which was
13 adopted by the district court (Doc. # 196). As such, the following claims remain: (1) Count 1-
14 procedural due process related to a disciplinary charge; (2) Count 3- First Amendment access to
15 courts; and (3) Count 7- Eighth Amendment excessive force and deliberate indifference and First
16 Amendment retaliation.
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18 Plaintiff subsequently filed a motion seeking a preliminary injunction: (1) prohibiting the
19 alleged falsification of records as to why he was in protective segregation; (2) moving him from
20 segregated housing to general population; and (3) prohibiting a retaliatory transfer. (Doc. # 210.)
21 The court concluded that none of these concerns relate to the allegations made in the remaining
22 claims in this case. (Doc. # 256.) The court advised Plaintiff that he may not file an action in
23 federal court and then use the action as a forum to air unrelated grievances. (*Id.*) Plaintiff was
24 further advised he should first use the prison grievance system to address his concerns, and
25 following the exhaustion of his administrative remedies, file a new action if he deems it
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1 appropriate to do so. (*Id.*) The court also denied Plaintiff's request for an evidentiary hearing in
2 connection with this motion. (*Id.*)

3 On August 30, 2013, Plaintiff filed a "Notice of Appeal in Part." (Doc. # 258.) He
4 appeals to the United States Court of Appeals for the Ninth Circuit from the order (Doc. # 256)
5 entered concerning his motion for injunctive relief (Doc. # 210) and motion for evidentiary
6 hearing in support of his request for injunctive relief (Doc. # 211).

7 The Ninth Circuit referred this matter to the district court for the limited purpose of
8 determining whether Plaintiff's in forma pauperis status should continue on appeal or whether
9 the appeal is frivolous or taken in bad faith. (Doc. # 263.)
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11 On September 13, 2013, the undersigned issued a report and recommendation to United
12 States District Judge Miranda M. Du that she should certify that Plaintiff's appeal is not taken in
13 good faith so that his in forma pauperis status on appeal would be revoked. (Doc. # 267.)
14 Specifically, the undersigned found:
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16 Plaintiff's appeal is frivolous and therefore not taken in good faith. The court
17 advised Plaintiff multiple times in this litigation that he may not seek injunctive
18 relief with respect to concerns that are unrelated to his pending claims.
19 (*Id.*)

20 Plaintiff filed an objection to the report and recommendation. (Doc. # 272.) District Judge
21 Du conducted a de novo review of the report and recommendation, considered Plaintiff's
22 objection, and adopted the report and recommendation on September 27, 2013. (Doc. # 274.)
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24 In the instant motion, filed on October 2, 2013, Plaintiff expresses his apparent
25 disagreement with this outcome and requests a stay of this order (Doc. # 274) so that his appeal
26 can proceed and he can seek in forma pauperis status.
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1 The court preliminarily considered Plaintiff's request to stay proceedings at a status
2 conference conducted on October 8, 2013. (Doc. # 280.) The court noted that Mr. Ellis had
3 appealed the denial of his motion for injunctive relief. (Doc. # 258.) However, the court advised
4 Plaintiff that as it appeared to the court that his appeal involved issues which do not bear on the
5 underlying substantive claims in this case (citing Judge Du's Order, Doc. # 256), the court saw
6 no merit to delay discovery in this case. (Doc. #280 at 2.)

8 On October 24, 2013, the Ninth Circuit issued an order acknowledging the District
9 Court's certification that Plaintiff's appeal is not taken in good faith and revoking Plaintiff's
10 in forma pauperis status on appeal. (Doc. # 286.) In addition, the Ninth Circuit reviewed the
11 record itself and confirmed that Plaintiff's appeal is frivolous and as such he is not entitled to
12 in forma pauperis status on appeal. (*Id.*)

14 Accordingly, the court finds there is no basis to stay the court's order at Document
15 Number 274 certifying that the appeal is taken in bad faith and revoking Plaintiff's in forma
16 pauperis status on appeal.

18 Plaintiff also seeks an order staying discovery and the discovery deadlines that were set at
19 a hearing conducted on August 9, 2013. (*See Minutes at Doc. # 254.*) Because the court, and now
20 the Ninth Circuit, have expressly found Plaintiff's appeal is frivolous, the court finds there is no
21 basis to stay any of the discovery deadlines set in this case.

23 Therefore, Plaintiff's motion (Doc. # 277) is **DENIED**.

24 **IT IS SO ORDERED.**

25 DATED: November 4, 2013.

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27 **WILLIAM G. COBB**
28 **UNITED STATES MAGISTRATE JUDGE**